



Attorney General of New Mexico

GARY K. KING

Attorney General

October 9, 2013

ALBERT J. LAMA

Chief Deputy Attorney General

The Honorable Trudy Jones
Albuquerque City Council
P.O. Box 1293
Albuquerque, New Mexico 87103

Dear Councilor Jones:

We are responding to your July 23, 2013 request for an Attorney General's Opinion on the current effort to place an abortion ban measure on the city election ballot. The proposed measure, titled the "Pain Capable Unborn Child Protection Ordinance," would bar abortions at and after twenty weeks of gestation. As discussed below, although we are unable to comply with your request for an opinion, judicial opinions from other states addressing similar abortion legislation strongly suggest that the proposed measure is unconstitutional and, if adopted, would be unenforceable.

The Attorney General is authorized to provide legal opinions only in response to questions submitted by "the legislature or any branch thereof, any state official, elective or appointive, or any district attorney on any subject pending before them or under their control with which they have to deal officially or with reference to their duty in office." NMSA 1978, § 8-5-2(D) (emphasis added). Consequently, unless otherwise authorized by law, the Attorney General does not provide legal counsel and opinions to private individuals and entities or to local governments and their officials, including members of city councils. To issue an opinion addressing the questions you raise, we would require a request from a legislator or other state official.

Although we are unable to formally respond to your request, we direct your attention to recent federal cases striking down statutes passed in other states that are identical to or substantially similar to the ordinance proposed in Albuquerque. Within the last few months alone, federal courts have prohibited the enforcement of these statutes in Idaho,¹ Arizona,² Arkansas,³ and North Dakota.⁴

¹ *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1150-51 (D. Idaho 2013).

² *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).

³ *Edwards v. Beck*, 2013 U.S. Dist. LEXIS 75277 (E.D. Ark. May 23, 2013).

⁴ *MKB Mgmt. Corp. v. Burdick*, 2013 U.S. Dist. LEXIS 102620 (D. N.D. July 22, 2013).

Councilor Trudy E. Jones

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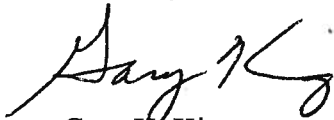
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The grounds for striking down these statutes is rooted in *Roe v. Wade*, 410 U.S. 113 (1973), in which the U.S. Supreme Court declared that a pregnant woman has a constitutional right, under the Due Process Clause of the Fourteenth Amendment, to choose to terminate her pregnancy before "viability." Viability is defined as the timeframe after which "the fetus ... presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. Significantly, the Tenth Circuit Court of Appeals—which governs federal cases arising out of New Mexico—struck down a ban on abortions enacted in Utah because it unconstitutionally established viability at twenty weeks. *Jane L. v. Bangerter*, 102 F.3d 1112, 1115-18 (10th Cir. 1996), *cert. denied* *Leavitt v. Jane L.*, 520 U.S. 1274 (1997).

Although there are likely other arguments grounded in the U.S. and New Mexico Constitutions, the cases cited above are sufficient to show that the overwhelming weight of judicial authority does not support enactments, like the proposed Albuquerque ordinance, that attempt to ban otherwise legal abortions. Even if Albuquerque voters approved the proposed measure, we believe the measure would not be legally enforceable.

If you have any further questions about this matter, please feel free to contact us.

Sincerely,



Gary R. King
Attorney General



Phillip P. Baca
Assistant Attorney General